



EUROPEAN COMMISSION

Brussels, 20.4.2021  
C(2021) 2895 final

Mr Peter Teffer  
Ekko Voorkamer  
Bemuurde Weerd WZ 3  
3513 BH Utrecht  
The Netherlands

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2020/3437**

Dear Mr Teffer,

I refer to your e-mail of 10 November 2020, registered on the same day, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in the handling of your request.

**1. SCOPE OF YOUR REQUEST**

In your initial application of 4 June 2020, addressed to the Directorate-General for Health and Food Safety, you requested access to, I quote,

‘All e-mails, including attachments, between the Commission and member states about the shipment of medical masks delivered to 17 Member States and the UK to protect healthcare workers against coronavirus, as part of the Emergency Support Instrument’.

Following a fair solution proposal, the European Commission’s Directorate-General for Health and Food Safety identified 134 documents as falling within the scope of your request and provided you with a list of the documents in question.

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<sup>1</sup> OJ L 345, 29.12.2001, p. 94.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

In its initial reply of 26 October 2020, the Directorate-General for Health and Food Safety granted full access to documents 3, 74 and 75. It granted partial access to documents 9-39, 42-44, 46-73, 76-94, 97, 98, and 101-112, as their full disclosure was prevented by one/several exception/s to the right of access laid down in Article 4 of the Regulation (EC) No 1049/2001. It refused access to documents 1, 2, 4-8, 40, 41, 45, 95, 96, 99, 100, and 113-134 based on one/several exception/s laid down in Article 4 of the same Regulation. The Directorate-General for Health and Food Safety took into account the replies from the Member States concerned, consulted in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001.

In your confirmatory application, you contest the assessment of the Directorate-General for Health and Food Safety as regards the (partial) redactions in several documents.

The arguments that you put forward in support of your position have been taken into account in the assessment and will be addressed in the corresponding sections below.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I can inform you that:

- full access is granted to documents 5-8, 113-116, 118-123, 125, and 129-134;
- further partial access is granted to documents 10-12, 15, 16, 18-21, 28, 29, 31, 32, 34, 35, 37, 38, 43, 47-49, 51, 54, 55, 62, 63, 64, 78-81, 83, 84, 86, 88-92, 94, 98, 101-107, 109-112, and 117 with only limited parts redacted in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

I regret to inform you that I have to confirm the initial decision of the Directorate-General for Health and Food Safety to refuse access to:

- parts of documents 9, 13, 14, 17, 22-27, 30, 33, 36, 39-42, 44, 46, 50, 52, 53, 55-62, 65-68, 71-73, 76, 77, 82, 85, 87, 93, 97 and 108, based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- documents 1, 2, 4, and the relevant redacted parts of documents 14, 23, 53, 61, 62, 69, 70, 77 and 97 based on the exception of the first indent (protection of commercial interests) of Article 4(2) of the same Regulation;
- documents 40, 41, 45, 95, 96, 99, 100, 124, 126-128 in accordance with the first indent (protection of public security) of Article 4(1)(a) of Regulation (EC) No 1049/2001.

As the Directorate-General for Health and Food Safety did not receive a reply from the Member States from which documents 91, 92, 94, 107, 109-112, 122, 123, and 132-134

originate, the Secretariat-General re-consulted, in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001, the relevant authorities as to the possible (partial) disclosure of these documents. In reply to these consultations, the Member State authors of documents 94, 107, 109, 123, 132 and 133 agreed with the disclosure of these documents, subject to the redaction of the personal data.

The Secretariat-General did not receive replies to its consultations on documents 91, 92, 110-112, 122, and 134. However, following the examination of the content of these documents, their disclosure would not undermine any of the interests protected under Article 4 of Regulation (EC) No 1049/2001, with the exception of the personal data, which is protected under Article 4(1)(b) of the same Regulation.

As regards the remaining documents, the assessment takes into account the position of the Member State originators as expressed in their replies to the consultation by the European Commission.

The detailed reasons underpinning the assessment are set out below.

## **2.1. Protection of the public interest as regards public security**

The first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards public security'.

In its judgment in Case T-74/16 (*Pagkyprios Organismos Ageladotrofon v Commission*), the General Court clarified that 'before refusing access to a document originating from a Member State, the institution concerned must examine whether that Member State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation No 1049/2001 and has given proper reasons for its position. Consequently, when taking a decision to refuse access, the institution must make sure that those reasons exist and refer to them in the decision it makes at the end of the procedure'<sup>3</sup>.

The General Court clarified in this judgment that the institution 'must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document applied for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access provided for in Article 4(1) to (3) of the regulation applies'<sup>4</sup>.

According to Article 4(4) and 4(5) of Regulation (EC) No 1049/2001, as regards third party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

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<sup>3</sup> Judgment of the General Court of 8 February 2018, *Pagkyprios Organismos Ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 55.

<sup>4</sup> *Pagkyprios Organismos Ageladotrofon v Commission* judgment quoted above, paragraph 56.

According to Article 4(5) of the same Regulation, a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

In reply to the consultation, the authorities of Poland opposed the disclosure of documents 99, 100, 126-128. They stated that, I quote, '[t]he abovementioned documents relate to the implementation of the Government Program on Strategic Reserves and contain elements of this Program. The Program was given a confidentiality clause in accordance with national legislation in order to protect public security. On this basis the documents shall be treated as sensitive documents within the meaning of Article 9 of Regulation No 1049/2001 accordingly. Therefore, in Poland's view the documents in question fall under the public interest exception as regards public security provided for in the first indent of Article 4.1. a) of Regulation (EC) No 1049/2001'.

Moreover, the authorities of Poland opposed the disclosure of document 45, arguing that the document, I quote, 'also contains information produced by the Polish institutions in the implementation of the Government Strategic Reserves Program'.

As regards documents 40, 41, 95, 96 and 124, the authorities of Malta based their opposition 'on the grounds of Article 4 (1) and (2) of Regulation (EC) No 1049/2001'. They considered that, I quote, '[t]he requested documents contain information on Malta's strategic stockpiles and also the weekly consumption of masks and thus divulging the information could undermine public security and also the commercial interests of Malta for future procurements of PPEs'.

I have carried out an assessment at first sight of the reply provided by the authorities of Malta and Poland. Following this assessment, I conclude that the national authorities have based their substantive opposition to disclosure of the requested documents mainly on the exception in the first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 and have given proper reasons in support of their position. These arguments *prima facie* justify the application of the exception invoked by the national authorities.

In your confirmatory request, you contest the applicability of the above-referred exception to documents reflecting the final allocation of the masks, which are herewith disclosed. However, you do not challenge the applicability of the exception as regards the documents reflecting the needs of the two Member States concerned in relation to medical countermeasures.

In any event, and as explained above, the authorities of Malta and Poland have provided proper justifications on how the disclosure of the above-referred documents would undermine the protection of public security in those Member States. I consider that these arguments, at first sight, justify the application of the exception protecting public security, as invoked by the national authorities.

Moreover, the Court of Justice has acknowledged that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’<sup>5</sup>.

The General Court has also ruled that, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation’<sup>6</sup>.

In light of the above, I must conclude that the use of the exception under the first indent (protection of public security) of Article 4(1)(a) of Regulation (EC) No 1049/2001 is justified, and that access to documents 40, 41, 45, 95, 96, 99, 100, 124, and 126-128 must be refused on that basis.

## **2.2. Protection of privacy and the integrity of the individual**

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’.

In its judgment in Case C-28/08 P (*Bavarian Lager*)<sup>7</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>8</sup> (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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<sup>5</sup> Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council of the EU*, T-264/04, EU:T:2007:114, paragraph 40.

<sup>6</sup> Judgment of the General Court of 11 July 2018, *ClientEarth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23. See also Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

<sup>7</sup> Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

<sup>8</sup> OJ L 8, 12.1.2001, p. 1.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC<sup>9</sup> (hereafter ‘Regulation (EU) 2018/1725’).

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’<sup>10</sup>.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’<sup>11</sup>.

The requested documents contain the names, surnames, functions and contact details (e-mail addresses, telephone numbers and the office address) of staff members of the European Commission who do not form part of the senior management. They also contain the names, surnames and contact details (e-mail addresses, telephone numbers) of representatives of the Member States and third parties.

The names<sup>12</sup> of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

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<sup>9</sup> OJ L 295, 21.11.2018, p. 39.

<sup>10</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>11</sup> Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>12</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data<sup>13</sup>. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

### **2.3. Protection of commercial interests**

The first indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'.

In your confirmatory application, you do not question in general the applicability of the exception referred to above. Rather, your argumentation focuses on the alleged existence of an overriding public interest in the disclosure of the identity of the manufacturer. These arguments will be addressed in section 3 below.

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<sup>13</sup> Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

Documents 1, 2 and 4 contain information concerning an identified manufacturer, including control tests, quality inspection reports and other commercially sensitive information concerning the third party in question. The relevant redacted parts of documents 14, 23, 53, 61, 62, 69, 70, 77 and 97 reflect the details on the conformity with relevant standards and mitigation measures proposed by the manufacturer. Moreover, they concern the commercial relations of the manufacturer vis-à-vis other entities.

Having examined the (relevant parts of the) documents concerned, I consider that their disclosure would undermine the protection of commercial interests in the sense of the first indent of Article 4(2) of Regulation (EC) No 1049/2001. Indeed, public access to the detailed information on the quality issues affecting the products manufactured by an identified company could be instrumentally used against the reputation of the company. That in turn, would have a negative impact on its market position and would clearly undermine its commercial interests. I consider that the same considerations apply to the information on the mitigation measures proposed by the manufacturer.

Please note that it is not possible to give more detailed descriptions justifying the need for confidentiality without disclosing the content of the documents and, thereby, depriving the exception of its very purpose<sup>14</sup>.

Consequently, I must conclude that, pursuant to the first indent of Article 4(2) of Regulation (EC) No 1049/2001, access to the above-referred documents cannot be granted as this would pose a real and non-hypothetical risk for the commercial interests of the third parties concerned.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal<sup>15</sup>.

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<sup>14</sup> To that effect, see Judgment of the General Court of 24 May 2011, *Navigazione Libera del Golfo Srl v Commission*, Joint Cases T-109/05 and T-444/05, EU:T:2011:235, paragraph 82; Judgment of the General Court of 8 February 2018, *Pagkyrios Organismos Ageladotrofon v Commission* judgment, quoted above, paragraph 71.

<sup>15</sup> Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

In your confirmatory application, you put forward a number of arguments that would substantiate, in your view, the existence of an overriding public interest in the disclosure of the identity of the manufacturer of the masks. You state that, I quote, ‘[i]t is of the utmost public interest that those responsible for buying masks are aware of who this legal person is. If there was ill intent, there is an overriding public interest that the identity of the legal person is known. If it was unintentional, and “the mitigation response in light of the issues with quality which arose from the inspection reports” was admirable, then releasing the “detailed information” could actually serve as something that would promote the commercial interests of this legal person’. You add that, I quote, ‘[t]he public, specifically those in charge of buying personal protective equipment, need to know about “the quality of their product” so that a repetition of the situation does not happen again’.

Having carefully analysed the above-referred arguments, I consider that they do not demonstrate any pressing need for the public to obtain further access to the documents reflecting the identity of the manufacturer and the limited withheld parts of the documents related to the commercial relations of the manufacturer. Indeed, you do not explain how and why the disclosure of the identity of the manufacturer, specifically, would contribute to assuring protection of a public interest to the extent that the principle of transparency takes precedence over the protection of the commercial interests. I take the view that such general considerations do not establish that, in the case at hand, the principle of transparency is capable of prevailing over the reasons justifying the refusal of the documents concerned. Furthermore, I consider that any public interest has been satisfied with the wider access that is herewith granted to the documents that you seek to obtain.

Nor have I been able to identify any public interest capable of overriding the interests protected by the exception laid down in the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness<sup>16</sup>, provides further support to this conclusion.

Please note also that Article 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

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<sup>16</sup> Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

#### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

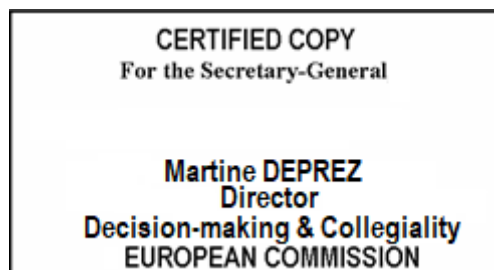
However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above. The (redacted parts of the) documents are covered in their entirety by the invoked exception to the right of public access.

#### **5. MEANS OF REDRESS**

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

*For the Commission*  
*Ilze JUHANSONE*  
*Secretary-General*



Enclosures: (74)